IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	
MITCHELL GRIFFIN,	)	I.D. # 0401020858
Defendant	)	

Submitted: May 4, 2006
Decided: July 27, 2006

Upon Defendant's Motion for Post Conviction Relief
DENIED.

ORDER

Mark B. Chernev, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Mitchell Griffin, Smyrna, Delaware, *pro se.*

COOCH, J.

This 27th day of July 2006, upon consideration of Defendant's *pro se* Motion for Postconviction Relief it appears to the Court that:

1. Mitchell Griffin ("Defendant") filed a Motion for Postconviction Relief[1] from his conviction of Rape in the Third Degree. Defendant was arrested on February 5, 2004 and indicted on March 22, 2004 on three

[1] Super. Ct. Crim. R. 61.

separate counts of Rape in the Third Degree.[2] The indictment alleged that the rapes took place between the first and last days of July, August, and September 2003.[3] Trial before this Court began on September 21, 2004 and concluded September 22, 2004. Defendant was found not guilty on two counts and guilty of one count of Rape in the Third Degree. This Court sentenced Defendant to five years at level five, suspended after serving three years at level five for two years at Level III or Level II probation.[4]

2. During the trial, Defendant filed a motion for mistrial, claiming that he was prejudiced in front of the jury because the chief investigating officer sat at the prosecutor's table for a short part of the jury selection process. This Court denied Defendant's motion, and Defendant appealed. The Delaware Supreme Court, affirming this Court's decision, ruled that the Defendant was not prejudiced by the officer's temporary presence at the prosecutor's table, this Court did not abuse its discretion, and Defendant's motion for mistrial was properly denied.[5]

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[2] 11 *Del. C*. § 771 (a)(1).

[3] Bayard Aff. at 1, Doc. 33, March 14, 2006.

[4] Defendant was also sentenced to pay $369.00 in restitution costs and register with the State Bureau of Identification as a Tier 2 Sex Offender.

[5] *Griffin v. State*, 2005 WL 528836 (Del. Feb. 22, 2005).

3. Defendant filed this *pro se* motion for post conviction relief[6] on three separate grounds. Defendant's claims are set forth *in toto*:

> 1. Counsel was ineffective when he fail [sic] to investigate movant's claim that the day in which victim claims criminal offense(s) occurred, victim was in school and Department of Education records would have been favorable to movant. Counsel refused to call witnesses on movant [sic] behalf. Movant was denied a fair trial by counsel.
> 2. Movant [sic] greatest evidence(s) was a letter victim gave to state prosecuting attorney, in which, did bear movant name or anything at which could have made movant a person of interest in this matter which movant seek(s) relief [sic]. Any and all Rule 16 (b)(1)/Brady v. Maryland, 373 U.S. 83 (1963):, should have been available to defendant. It was not.
> 3. Defense counsel, in preparing defense, never called or interview [sic] any witnesses to truthfully testify on movant behalf [sic]. There were (2) defense witnesses in the courthouse and ready to testify on behalf of movant. These witnesses were mislead and sent home. [7]

4. When assessing a motion for post conviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61(i) before considering the merits of the individual claims.[8] Rule 61(i) states that motions will bar relief where (1) the motion was filed more than one year after the judgment of conviction is final; (2) any ground for relief that was not asserted in a prior postconviction proceeding; (3) any ground for relief that was not asserted in the proceedings leading to the judgment of conviction; (4) any ground for relief that was formerly adjudicated; and (5)

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[6] This Court previously denied Defendant's motion for modification of sentence pursuant to Super. Ct. Crim. R. 32.1 on May 9, 2005.

[7] Def.'s Mot. For Postconviction Relief at 3.

[8] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

the bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim where the movant asserts a constitutional violation.[9] Because Defendant is asserting grounds for relief that were not formerly adjudicated, and because Defendant is asserting claims involving his constitutional rights, the Defendant's motion is not procedurally barred.

5. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[10] Therefore, in a motion for postconviction relief "on the grounds of ineffective assistance of counsel, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness,' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[11] In order to avoid dismissal, the movant must "set forth concrete allegations of actual prejudice and substantiate them."[12]

6. The Defendant alleges that his counsel did not investigate whether or not the victim was in school at the time the rape occurred, which apparently

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[9] Super. Ct. Crim. R. 61(i).

[10] *Strickland v. Washington*, 466 U.S. 668, 686, *reh'g denied*, 467 U.S. 1267 (U.S. 1984).

[11] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988)(quoting *Strickland*, 466 U.S. at 688, 694).

[12] *Younger v. State*, 580 A.2d 552, 555-56 (Del. 1990).

refers to the rape that occurred in September 2003, because his counsel did not obtain a copy of the victim's records from the Department of Education.[13] However, the victim testified that her two school age cousins Dontae, age fourteen at the time of the trial, and Najee, age eleven at the time of the trial, were both inside the same house as she and Defendant when she and the Defendant engaged in a sexual encounter.[14] Furthermore, the New Castle County Police report noted that the victim told the police that there was no school the day the rape occurred and the two adult guardians in the home were at work.[15]

7. In *Chinski v. State* the Delaware Supreme Court ruled that although the defendant claimed:

> "his counsel provided ineffective assistance by failing to investigate the crime scene, have DNA testing done, investigate phone records, investigate his mental health history, investigate his wife's life insurance policy and title to the residence, and investigate his therapist's records, he does not state with specificity how these alleged errors on the part of his counsel resulted in prejudice to him. In the absence of any evidence that counsel's investigation of these matters would have altered the outcome of the trial, we find these claims to be without merit."[16]

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[13] The Court understands Defendant's use of the word "records" to mean attendance records.

[14] Trial Tr. vol. 1, 72, 82, September 21, 2004.

[15] Bayard Aff. at 1, Doc. 33, March 14, 2006.

[16] 2006 Del. LEXIS 225, at *3-4 (Del. May3, 2006).

Here, Defendant has failed to specifically show a reasonable probability that a speculative investigation conducted by his counsel, into the victim's school records, would have affected the outcome of the trial. In short, Defendant has failed to "set forth concrete allegations of actual prejudice and substantiate them."[17]

8. Defendant further claims that his counsel was ineffective because his counsel failed to call witnesses on his behalf during the trial, interview two witnesses prior to the trial, and that his counsel misled a witness and sent her home, instead of examining her at trial. During trial, Defendant's counsel advised the Court that three witnesses were subpoenaed on behalf of Defendant. Defendant's counsel further advised that one witness, Latesha Aponte, had come to the courthouse, but left prior to the conclusion of the trial.[18] This Court issued a capias for Ms. Aponte.[19] However, the New Castle County Police were unable to locate her, so she never testified.[20] Defendant also references Angie Demby in his motion as a potential witness. When a subpoena was being served on Ms. Demby, her sister, Tina Simmon,

[17] *Younger*, 580 A.2d at 555-56.

[18] Bayard Aff. at 2, Doc. 33, March 14, 2006.

[19] Trial Tr. vol. 1, 106, September 21, 2004.

[20] Bayard Aff. at 2, Doc. 33, March 14, 2006.

stated that Ms. Demby was in the hospital.[21]

9. Defendant's counsel subpoenaed the witnesses that Defendant claims should have testified on his behalf. Whether or not a witness responds to a subpoena does not reflect the reasonableness or unreasonableness of Defendant's counsel's actions. Furthermore, the witnesses inaccessibility is in no way a reflection of Defendant's counsel's effectiveness or ineffectiveness. Therefore, the Defendant has not shown that his counsel's conduct was objectively unreasonable.

10. Defendant alleges that the State failed to produce a letter written by the victim, which he alleges would have exonerated him, in violation of his due process rights afforded by the Fourteenth Amendment. In support of his claim, the defendant cites *Brady*, which states that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[22] In determining if Defendant's due process rights were violated the court must decide whether the non-disclosures involve evidence that is favorable to the

[21] *Id.*

[22] *Brady v. Maryland*, 373 U.S. 83, 87 (U.S. 1963).

defendant.[23] If so, the court must decide whether the undisclosed evidence has a reasonable probability of affecting the outcome of the trial.[24]

11. Here, Defendant claims that a letter written by the victim would have exonerated him. While the letter did not refer to Defendant by name, the victim testified at trial that the "boy" she referred to in the letter was in fact Defendant.[25] Also, the letter was provided to Defendant at trial.[26] In light of these facts, which demonstrate that the letter was not favorable evidence for Defendant, and given the fact that Defendant's motion is silent on the manner in which he was prejudiced with regard to disclosure of the letter, Defendant's claims in this regard lack merit. Further, Defendant has failed to meet his threshold burden of demonstrating by a reasonable probability that the outcome of the trial would have been any different had the State disclosed the letter to Defendant in a different manner.

[23] *Lilly v. State*, 649 A.2d 1055, 1057-58. (Del. 1994).

[24] *Id*.

[25] Trial Tr. vol. 1, 74-76, September 21, 2004.

[26] Bayard, James, Letter in Response, Doc. 34, April 12, 2006.

12. For the reasons stated, Defendant's Motion for Postconviction Relief is **DISMISSED**.

IT IS SO ORDERED.

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Richard R. Cooch

oc: Prothonotary
Investigative Services
Office of the Public Defender